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Nos. 87-976, 87-977, 87-979

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

CITY OF WILLCOX, ARIZONA, and
ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN SUPPORT OF ANR PIPELINE COMPANY AND COLORADO INTERSTATE GAS COMPANY

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit erred in holding that the Federal Energy Regulatory Commission ("FERC") has statutory authority to impose common carrier status and duties upon interstate natural gas pipeline companies.

PARTIES

ANR Pipeline Company (ANR) and Colorado Interstate Gas Company (CIG) the parties to this brief, were parties in the proceedings in the Court of Appeals, below.

ANR and CIG are wholly owned subsidiaries of Coastal Corporation. Numericon, Inc. is an affiliate which is not wholly owned.

ANR and CIG adopt by reference the list of Parties to the proceedings below which is set forth at pages ii through iv of the Petition For Writ of Certiorari filed in Case No. 87-976 by Petitioner Interstate Natural Gas Association of America.

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BRIEF IN SUPPORT OF ANR PIPELINE COMPANY AND COLORADO INTERSTATE GAS COMPANY

ANR Pipeline Company ("ANR") and Colorado Interstate Gas Company ("CIG") file this brief in support of the following petitions for writ of certiorari:

Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, No. 87-976; Texas Eastern Transmission Corporation v. Federal Energy Regulatory Commission, No. 87-997; and City of Willcox, Arizona, and Arizona Electric Power Cooperative, Inc. v. Federal Energy Regulatory Commission, No. 87-979. Each such petition seeks review and reversal of the same portion of the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in *Associated Gas Distributors v. Federal Energy Regulatory Commission*, 824 F.2d 981 (D.C. Cir. 1987).[1]

ANR and CIG were parties to the proceedings in the Court of Appeals below, and concur with the above listed petitioners that the portion of such Court of Appeals judgment and opinion which finds that the Federal Energy Regulatory Commission ("FERC") has statutory authority to impose common carrier status and duties upon interstate natural gas pipeline companies, including ANR and CIG, is in error and should be reversed. ANR and CIG also concur that these proceedings are of extreme importance to the natural gas industry, and thus the Nation's economy.

OPINIONS AND ORDERS BELOW

ANR and CIG adopt the listing of opinions and orders below which appears at page 2 of the Petition For Writ of Certiorari in Case No. 87-976.

JURISDICTION

The above referenced judgment of the Court of Appeals was entered on June 23, 1987. The orders denying petitions for rehearing and suggestions for rehearing *en banc* were entered on September 15, 1987.

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[1] That judgment and opinion is set forth at pages 1a through 128a of the Joint Appendix filed in the above-captioned proceedings on behalf of the above listed Petitioners in Case Nos. 87-976, 87-977 and 87-979. ANR and CIG adopt such appendix and will refer to it as "Joint Appendix."

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Section 5 and 7 of the Natural Gas Act ("NGA") of 1938, 15 U.S.C. § 717d and 717f, and Sections 311(a) and 602(b) of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3371(a) and 3432(b). These statutory provisions are set forth at pages 155a through 160a and 162a through 164a of the Joint Appendix.

Portions of Federal Energy Regulatory Commission ("FERC") Order No. 436, which impose common carrier status and duties upon natural gas pipelines, including FERC regulations 284.8 and 284.9 (18 C.F.R. §§ 284.8 and 284.9), are set forth at pages 129a through 136a of the Joint Appendix.

STATEMENT OF THE CASE

The three petitions for writs of certiorari which this brief supports ("subject petitions") seek reversal of a portion of the decision of the Court of Appeals below, which upholds that portion of FERC Order No. 436 which has the effect of imposing the status and duties of common carriers upon interstate natural gas pipelines. Such a step, if not reversed, will permanently cause a dramatic change in the natural gas industry, reversing the practices which have been carried on since the start of the industry, early in this century.

Both the FERC and the Court of Appeals, below, believe that FERC Order No. 436, and particularly the "open access transportation" provision thereof, which imposes the common carrier status and obligations on pipelines, is one of the few "great regulatory milestones" of the natural gas industry, along with the enactment of the NGA and the NGPA, and this Court's decision in

Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954). As the Court of Appeals states, such provisions of Order No. 436 create a "complete restructuring of the natural gas industry." (Joint Appendix at 17a.)

The reason that the proceedings below have produced such a drastic change in the natural gas industry is that prior to FERC Order No. 436, natural gas pipelines both purchased and sold natural gas (albeit "at cost," with no profit on the resale, with their profits and recovery of other costs coming from their transportation of such gas to the buyer), and also transported gas owned by others. However, the pipeline had no obligation to transport gas owned by others, and the purchase and sale of gas was the predominant activity of the pipelines. In turn, pipelines undertook purchase obligations to producers of natural gas, in order to assure that the pipelines could fulfill their sales obligations to their customers.

Numerous legislative attempts to impose general common carrier status upon pipelines, which would have required them to transport gas for anyone who asked for such service, failed over the decades, and one legislative provision imposing common carrier obligations upon pipelines crossing federal lands was later repealed. (See Section IIB of the Reasons For Granting The Petition portion of the Petition For Writ of Certiorari in Case No. 87-976 of Interstate Natural Gas Association of America, for a review of such legislation.) Thus, the pattern and practice of the industry was that pipelines carried on activities (sales and, to a lesser extent, transportation of third party owned gas) on the basis of contracts entered into by willing sellers and buyers of gas and/or transportation service. When contracts were entered into, they were subject to FERC authorization.

FERC Order No. 436 reverses such pattern. It authorizes transportation activities to be undertaken pur-

suant to "self implementing" transactions, with no requirement of FERC authorization of any of such transactions. But pipelines which carry on such transactions are required to transport for all persons who request such service, and cannot decline to transport gas and provide sales service instead. (See the portions of FERC Order No. 436 which accomplish such result, Joint Appendix pp. 129a through 136a.) The FERC has also made securing conventional authorizations for transportation activity very difficult for pipelines, and has imposed infeasible conditions and extreme delays, thus enforcing the imposition of the above described "open access, common carriage" requirements.

The result of such a drastic "restructuring" of the natural gas industry is well summarized in Section I of the Reasons For Granting The Petition portion of the Petition for Certiorari in Case No. 87-976 of Interstate Natural Gas Association of America. Pipeline sales of gas have fallen to a small fraction of their former levels. As a result, pipelines have been unable to purchase gas from gas producers under their gas purchase contracts and have been forced to make large payments for gas which the pipelines could not sell, and thus could not purchase and take. In addition, producers have filed hundreds of lawsuits against pipelines and have asserted thousands of claims which will, in many cases, become additional lawsuits. Pipeline revenues have fallen drastically, while the above liability and exposure to massive further liability, has grown dramatically, to billions of dollars.[2]

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[2] The fact that FERC Order No. 436 so drastically decreases pipeline sales, while doing nothing to relieve pipelines from the obligations of their gas purchase contracts, led the Court of Appeals, below, to remand Order No. 436 for FERC mitigative action relative to the pipeline obligations to producers of gas under the "take-or-pay contracts." On remand, the FERC reissued the "open access, common carriage" portion of Order No. 436. The FERC also issued some measures directed at the "take-or-pay obligations,"

The above described "restructuring" of the natural gas industry threatens the nation's gas supply, and threatens the financial base and operating stability of the pipeline industry.

REASONS FOR GRANTING THE PETITIONS

Everyone agrees that FERC Order No. 436, by requiring interstate natural gas pipeline companies to become "open access transporters" which must transport gas for all who request such service, to the limits of their capacities, is changing the pipeline industry in a drastic, far reaching way. The Court of Appeals, in affirming that aspect of Order No. 436, referred to the "restructuring" of the industry which Order No. 436 carries out, as one of the few "regulatory milestones of the industry." (Joint Appendix at p. 17a.) The FERC constantly states that Order No. 436 was intended to produce far reaching changes of the industry. For example, the FERC has said that "[i]n Order No. 436, the Commission fundamentally altered the way in which it regulates natural gas pipelines. . . .[3]

1. The importance of the FERC's assault upon the basic structure of the natural gas pipeline industry cannot be over estimated. As Petitioner Interstate Natural Gas Association of America summarizes the situation in Section I of the Reasons For Granting The Petition sec-

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which measures are the subject of current new appeals in the United States Courts of Appeal for the District of Columbia and Fifth Circuits: venue is as yet undecided. The action relative to take-or-pay contracts is the subject of the Petition For A Writ of Certiorari in Case No. 87-978 by large producers of natural gas (Shell Offshore Inc., *et al.*). ANR and CIG respectfully submit that if the "open access, common carriage" regulations were to be upheld, with their effect of reducing pipeline sales and pipeline ability to purchase gas, then effective measures to mitigate take-or-pay liability is required, as the Court of Appeals ordered.

[3] FERC Order No. 500, 52 Fed. Reg. 30,334 (August 14, 1987), FERC Statutes and Regulations (Regulations Preambles) (CCH) ¶ 30,761 (1987).

tion of its Petition For Writ of Certiorari in Case No. 87-976, and as noted in the Statement Of The Case herein, pipeline sales of gas have been cut to a small fraction of their former levels: to about one-third for ANR and CIG, and still falling. As a result, pipeline revenues have also been dramatically cut, and producer claims against pipelines, including in litigation against pipelines, have grown to billions of dollars. That fact is displayed in pipeline reports to the FERC, and FERC compilations. Consumer payments of such producer asserted costs, via pipeline rates, have grown, and far more cost to consumers is threatened, as lawsuits move on toward judgments.

2. The portion of Order No. 436 which has created such adverse results in the natural gas industry is the portion which has—unlawfully, it is submitted—imposed common carrier obligations and status upon natural gas pipelines. That is the "open access transportation" requirements. Such requirements force pipelines which carry on the "self implementing" transportation which has replaced pipelines' sales, to transport for all who request such service, to the limit of capacity. That forced transportation is the essence and substance of "common carriage." That is demonstrated in the three subject Petitions For Writ of Certiorari which this brief supports. (See, particularly, Section IIA of the Reasons For Granting The Petition portion of the Petition of Interstate Natural Gas Association of America. See, also, Section 2, pages 9-12, of the Petition of City of Willcox, *et al.*, and Section 1a, pages 5-6, of the Petition of Texas Eastern Transmission Corporation.)

There can be no doubt that the obligations imposed by FERC Order No. 436 do convert pipelines to "common carriers." Neither the FERC nor the Court of Appeals below refute that fact. Instead, they try to avoid the fact that such forced common carriage is beyond the FERC's authority and in violation of statutory limits,

but they make such attempt in inconsistent ways. The FERC says that it is not *imposing* common carrier status, because, it is alleged, pipelines accept such status in their "voluntary" act of carrying on self-implementing transportation. But that is a false conclusion, because such transportation is not voluntary. The Court of Appeals directly rejected that "voluntary" activity thesis (824 F.2d at 1024). In contrast, the Court of Appeals simply finds that the NGA and NGPA do not preclude imposition of common carrier status upon pipelines. But that conclusion is in error. It is refuted by the direct language of the NGPA and by the legislative history of, and subsequent Congressional action relative to, the NGA. Such holding of the Court of Appeals is in conflict with decisions of this Court and other Courts of Appeals, as shown in the subject Petitions, and hereinbelow.

3. The express prohibition of the NGPA, that "[n]o person shall be subject to regulation as a common carrier under any provision of federal or state law by reason of any transportation" under Section 311a of the NGPA, is wholly clear. (15 U.S.C. § 3432(b).) Each of the three subject Petitions show that such prohibition is clearly violated by FERC Order No. 436. The Court of Appeals has twisted that prohibition, to somehow find that it is applicable only to *state* law, *even though* the statute refers explicitly to *federal* law. That is clear error. (See Section IIC of the Reasons For Granting The Petition portion of the petition of Interstate Natural Gas Association of America; Section 1c of the Reasons For Granting The Writ portion of the petition of Texas Eastern Transmission Corporation; and Points 2 and 4, pages 9-11 and 12-15 of the Reasons For Granting Writ portion of the petition of City of Willcox, *et al.*)

4. As to the less extensive transportation under "blanket certificates" pursuant to the NGA, it is also clear that the NGA does not empower the FERC to impose common carrier status. That fact is also demon-

strated in the three subject Petitions For Certiorari, on the basis of legislative history which shows Congressional rejection of imposition of common carrier status when the NGA was enacted, and before that time in earlier proposals for interstate natural gas pipeline regulation. Further, those petitions also show that attempts to impose common carriage by amendment of the NGA have been rejected, and one limited imposition of common carriage—for pipelines across federal lands—was later repealed. Such legislation would have been unnecessary, and repeal fruitless, if pipelines had already been common carriers, or if the FERC could impose such obligations. (See Section IIB of the Reasons For Granting The Petition portion of the petition of Interstate Natural Gas Association of America; Section 1b of the Reasons For Granting The Writ portion of the petition of Texas Eastern Transmission Corporation; and Point 6, pages 17-20, of the Reasons For Granting Writ portion of the petition of City of Willcox, *et al.*)

5. In construing the Federal Power Act, a statute which has nearly identical terms and legislative history with the NGA, this Court and several United States Courts of Appeals have held that common carriage obligations cannot be imposed. Thus, the Court of Appeals hereinbelow is in direct conflict with such decisions. (See pages 13-14 of the Reasons For Granting the Petition portion of the petition of Interstate Gas Association of America; Section 2 of the Reason For Granting The Writ portion of the petition of Texas Eastern Transmission Corporation; and point 7, pp. 21-23, of the Reasons For Granting Writ portion of the petition of City of Willcox, et al.)

CONCLUSION

These proceedings are of immense economic importance to the nation, as well as to the natural gas industry. Total restructuring of the operations, and financial base, of the natural gas pipeline industry is being carried on because of the unlawful order of the FERC involved herein. The decision of the Court of Appeals below allows such far reaching changes to continue, in violation, it is submitted, of the NGPA and the NGA, by a holding which is inconsistent with holdings of this Court, and of other United States Courts of Appeal.

The existence of such errors of law, the drastic changes in the natural gas industry involved herein, and the severe costs to consumers of natural gas which are involved here, justify grant of the three subject Petitions for Certiorari and review and reversal by this Court of the decision below.

Respectfully submitted,

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